North Dakota Attorney General's LAW REPORT

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WARRANTLESS ARREST - CONFESSION - CONSENT

In *Kaupp v. Texas*, ___ U.S. ___ (2003), the Court held that a confession of participation in a murder should be suppressed when the confession was given after a warrantless arrest lacking probable cause.

Kaupp's brother confessed to stabbing his 14 year old half sister and implicated Kaupp in the crime. Officers tried but failed to obtain a warrant to question Kaupp but a detective decided to get Kaupp in for questioning and confront him with what his brother had said. Six officers went to Kaupp's residence at 3 a.m., awakened Kaupp, and told him that 'we need to go and talk.' Kaupp, who was 17 years old at the time, said "okay." Officers then handcuffed and led him shoeless and dressed only in boxer shorts and a t-shirt out of his house and into a patrol car. Nothing in the record indicated that Kaupp was told that he was free to decline to go with the officers.

The officers stopped for five or ten minutes where the victim's body had been found and then went to the sheriff's headquarters where Kaupp was advised of his Miranda rights. Although Kaupp initially denied any involvement in the victim's disappearance, 10 to 15 minutes into the interrogation, he admitted to having some part in the crime after being told of his brother's confession. He was later convicted and sentenced to 55 years imprisonment.

The state courts concluded that Kaupp's confession should not be suppressed. In reversing that decision, the Court recognized that a seizure of the person within the meaning of the 4th and 14th Amendments occurs when, taking into account all the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Although certain seizures may be justified on something less than probable cause, the Court has never sustained against 4th amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes absent probable cause or judicial authorization. Police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause. However, involuntary transport to a police station for questioning is sufficiently like an arrest to invoke the traditional rule that arrests may be constitutionally made only on probable cause.

The state did not claim to have had probable cause in this case. Kaupp did not consent to the transportation to the sheriff's department. His statement of "okay" in response to the officer's statement did not show consent under the circumstances. The officer offered Kaupp no choice and a group of police officers rousing an adolescent out of bed in the middle of the night stating "we need to go and talk" presents no option but "to go." There was no reason to think that Kaupp's answer was anything more than a mere submission to a claim of lawful authority. It

could not be seriously suggested that when detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed.

Since Kaupp was arrested before he was questioned and the state did not claim that probable cause existed to detain him at that point, the confession must be suppressed unless the confession was an act of free will sufficient to purge the primary taint of the unlawful invasion. The burden of persuasion to purge the taint is on the state. The giving of Miranda warnings alone cannot always break, for 4th Amendment purposes, the casual connection between the illegality and the confession. All other relevant considerations point toward the lack of any meaningful intervening event between the illegal arrest and Kaupp's confession.

DNA DATABASE - RETROACTIVE APPLICATION

In *State v. Norman*, 2003 ND 66, 660 N.W.2d 549, the Court affirmed the district court's order requiring the defendant to provide a DNA sample under N.D.C.C. § 31-13-03.

In 1992, the defendant was found guilty of a class AA felony murder for killing his wife. He received a life sentence. In 1995, N.D.C.C. ch. 31-13 was enacted to provide for DNA testing and a DNA database. As originally enacted, N.D.C.C. § 31-13-03 limited DNA testing to individuals convicted of certain sexual offenses or attempted sexual offenses. In 2001, this section was expanded to include DNA testing of certain non-sexual felony offenses, including defendant's class AA felony murder offense.

In December of 2001, the state moved the district court to order the defendant to provide a DNA sample under N.D.C.C. § 31-13-03. The defendant moved to quash the order and was denied.

The defendant argued that the district court committed error in finding N.D.C.C. § 31-13-03 retroactive. He argued that this section applied only to a person who was both convicted after July 31, 2001, and in custody of the Department of Corrections after that date. Since he was not convicted after July 31, 2001, he claimed that the statute should not apply to him. The state asserted that N.D.C.C. § 31-13-03 is retroactive by its clear and unambiguous language.

Giving N.D.C.C. § 31-13-03 its plain, ordinary, and commonly understood meaning, the Court concluded that the legislature intended to include two separate categories of individuals subject to DNA testing; any person convicted after July 31, 2001, of certain felony offenses and any person who is in custody of the Department of Corrections after that date. Examination of the legislative history strengthens the conclusion that the legislature intended the expanded DNA testing to include individuals in the custody of the Department after July 31, 2001, as a result of a conviction for one of these specified offenses.

The Court also rejected the defendant's ex post facto challenge to N.D.C.C. § 31-13-03. The legislature may apply statutes retroactively unless doing so would result in ex post facto application. A law which imposes a collateral consequence of a conviction may be applied retroactively if the purpose is to protect some other legitimate interest rather than to punish the offender. The constitutionality of a statute is a question of law and the Court will uphold the statute unless its challenge can demonstrate the statute's unconstitutionality. The defendant raised only a generalized ex post facto challenge to the statute but failed to develop the argument or articulate the assertion from his retroactivity argument. The Court found it unnecessary to decide the ex post facto argument but did note that its research had

revealed multiple cases in which courts have addressed and rejected ex post facto challenges to DNA testing statutes.

The Court also concluded that DNA testing did not violate the defendant's 5th amendment right against self-incrimination. Blood test evidence, even if potentially incriminating, is neither testimony nor evidence relating to a communicative act. An involuntary seizure of a blood sample does not implicate the 5th amendment. Obtaining a DNA sample by oral swab under N.D.C.C. § 31-13-03 does not violate the 5th amendment privilege against self-incrimination.

POST-CONVICTION PROCEEDINGS - SUMMARY DISPOSITION

In *Vandeberg v. State*, 2003 ND 71, 660 N.W.2d 568, the Court held that the state must meet its initial burden of showing the absence of a genuine of material fact to justify summary disposition of a post-conviction relief petition. Vandeberg pled guilty to robbery and theft. He was sentenced to prison terms but then filed a petition for post-conviction relief alleging that he did not knowingly and voluntary enter guilty pleas, his attorney failed to follow through with an appeal, and his guilty pleas were entered although he was innocent of the charges. The state responded and moved for summary disposition. The trial court granted the motion concluding that the state's response and motion for summary disposition put Vandeberg to his proof and he subsequently failed to provide the required evidence in support of his allegation.

The primary issue in this case was whether the state's response to Vandeberg's application for post-conviction relief was sufficient to put Vandeberg on his proof.

The initial burden is on the moving party to show there is a genuine issue of material fact. If the movant initially shows there is no genuine issue of material fact, the burden shifts to the non-movant to demonstrate there is a genuine issue of material fact. For the summary disposition of a petition for post-conviction relief, the moving party bears the burden of showing there is no dispute as to either the material facts or the inferences to be drawn from the undisputed facts, and that the movant is entitled to judgment as a matter of law. A movant may discharge his burden of showing there is no genuine issue of material fact by pointing out to the trial court there is an absence of evidence to support a petitioner's case. Once the movant shows the trial court there is no record of evidence to support the petitioner's claim, the movant has put the petitioner on his proof and a minimal burden has shifted to the petitioner to provide some competent evidence to support his claim.

The state is permitted to shift this burden in this manner only in those cases in which it would otherwise be required to prove the complete absence of any evidence supporting the nonmovant's claims and allegations in order to meet its initial burden of showing there are no contested issues of material fact. Otherwise, the moving party's initial burden must still be met before the burden can be shifted to the nonmovant to produce evidence prior to the hearing to support the claim.

In this case, the state failed to meet its initial burden of showing the absence of a genuine issue of material fact. The state did not argue that nothing in the underlying criminal case supported Vandeberg's claims nor did the state point out to the trial court how the record contradicted Vandeberg's allegations. The state merely asserted Vandeberg offered no evidence support its allegations.

The State is required to make at least a cursory review of the record and point out to the trial court how the petitioner's allegations are unsupported by the record and therefore fails to establish a genuine issue of material

fact. Because judges are not ferrets, obligated to engage in unassisted searches of the record for evidence to support a petitioner's petition, the state's motion was insufficient to put Vandeberg on his proof. The trial court erred in requiring nothing more of the state. The state must not merely respond to put a petitioner on his proof, but it must show the trial court it is entitled to judgment as a matter of law in its motion for summary disposition.

SIXTH AMENDMENT - RIGHT TO ASSISTANCE OF COUNSEL

In *Ellis v. State*, 2003 ND 72, 660 N.W.2d 603, the Court concluded that the record did not establish a violation of Ellis's 6th Amendment right to assistance of counsel when officer's obtained a search warrant and searched the office of a private investigator hired by Ellis and his attorneys. The search occurred after Ellis had been found guilty of attempted murder and sentenced to 20 years in prison but during his appeal.

During the course of his investigation of Ellis's case, the private investigator interviewed two individuals. The sheriff's department questioned whether the private investigator had represented himself as a law enforcement officer when talking to the individuals. Pretending to be a law enforcement officer is a criminal offense. The evidence seized pursuant to the search warrant included reports and statements involving the interview with the two individuals.

The trial court dismissed Ellis's petition for post-conviction relief, concluding that the search and seizure occurred months after Ellis's conviction and sentencing and that Ellis had failed to establish misconduct by the law enforcement officers who acted under a search warrant and did not exceed the scope of the warrant. The Court ruled that Ellis had not shown he was prejudiced by the search and seizure.

The burden of establishing a basis for post-conviction relief rests on the petitioner. A trial court's finding of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous.

The Court recognized that an essential element of an accused's 6th amendment right to assistance of counsel is the privacy of communication with counsel. There is a legitimate public interest in protecting confidential communications between an attorney and a client. The attorney-client relationship extends to communications between the client and the attorney or the attorney's representative. An accused's right to assistance of counsel precludes direct restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversarial fact-finding process. However, it has been recognized that some forms of state interference with the assistance of counsel and an attorney-client relationship do not directly impede the traditional functions of counsel in defending an accused.

A 6th amendment violation occurs if the government knowingly intrudes into the attorney-client relationship and the intrusion demonstratively prejudices the defendant or creates a substantial threat of prejudice.

In this case, the record did not establish deliberate prosecutorial misconduct. Ellis provided no evidence to establish that the state's conduct was improper. He did not attack the validity of the search warrant or provide transcripts of the probable cause hearing. He also failed to provide any affidavits in support of the search warrant to demonstrate improper conduct by the law enforcement officers. The state's alleged improper misconduct occurred after trial and while Ellis's direct appeal was pending in the Supreme Court. The alleged misconduct did not occur before or during the trial which may have warranted a different result. Rather, the

search warrant was executed after the jury trial and sentencing, and Ellis failed to demonstrate how his right to a fair trial was prejudiced. He also failed to make an offer, other than conjecture, that the results of the search altered the issues raised in his brief on appeal. The record did not establish gross misconduct by the law enforcement officers or evidence of prejudice to Ellis, and his 6th amendment right to counsel was not violated.

STOP AND FRISK - PROTECTIVE SEARCH

In *State v. Tollefson*, 2003 ND 73, 660 N.W.2d 575, the Court affirmed an order denying suppression of evidence that supported drug related convictions.

While she was driving, an officer stopped the defendant for speeding. When the officer approached the defendant's vehicle, the defendant stated that he did not have his driver's license with him but the officer noticed the smell of alcohol. When the defendant stepped out of his vehicle, the officer observed that the defendant was acting "jumpy" and "jittery" and the defendant began to dig in his pockets and fumble with his waistband. The officer repeatedly told the defendant to keep his hands out of his pocket and waist band but the defendant continued to fidget with his pants. The officer told the defendant that she was going to conduct a pat-down search for safety purposes. The officer felt a hard cylindrical object about 3 or 4 inches long in the pocket of the defendant's jeans. She reached in to remove the object from the pocket, discovering a plastic tube used to ingest methamphetamine and a piece of aluminum foil with drug residue. After the defendant's arrest, the defendant's vehicle was searched incident to the arrest, revealing a large quantity of methamphetamine and marijuana.

The defendant claimed that the pat-down search performed by the officer exceeded its permissible scope when the officer reached into his pocket and that the evidence, as well as any subsequently discovered evidence, should be suppressed.

In rejecting these claims, the Court noted that the defendant did not argue that the stop of his vehicle was improper. He also did not challenge the officer's right to perform a limited pat-down search for weapons. The defendant's actions of repeatedly reaching into the pockets and waist bands of his jeans, even after being told not to do so, gave the officer an articulable suspicion that the defendant might be armed and dangerous. A protective pat-down search for weapons was warranted to insure the officer's safety.

The defendant did contest the scope of the pat-down search that was performed. To comply with the 4th amendment, a pat-down search must consist solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. The performance of a pat-down search does not automatically entitle the officer to perform a pocket search. If, during the pat-down search, the officer locates an object but is able to determine through the sense of touch that the object is not a weapon, the pat-down search must stop and no pocket search may be performed. However, because weapon verification is essential if safety is to be preserved, a Court will not impose a condition of certainty that the object is a weapon before allowing an officer to continue the pat search to the inner clothing site where the object is located. To do so would frustrate the objective of the pat search. Rather, if the pat-down search reveals an object of a size and density that would reasonably suggest it might be a weapon, the officer may continue to search the inner garments where the object is located to determine whether the object is, in fact, a weapon.

At the suppression hearing, the officer testified that although the object she felt might have been a one-hitter marijuana pipe,

she was not sure what the object was. It was of the size and density that reasonably suggested that it was weapon. The officer also testified because of the defendant's erratic behavior she was concerned for her safety and concerned the object in the defendant's pocket might have been a weapon.

An officer who reasonably believes a suspect may have a weapon in his pocket but who is unable to determine with certainty if the object is a weapon during the pat-down search acts reasonably by reaching into the pocket to recover the object. Because the object in the defendant's pocket was of the size and density to reasonably suggest it was a weapon, the officer in this case was entitled for her own safety to take the action necessary to confirm the object in the defendant's pocket was not a weapon.

The Court also concluded that Minnesota v. Dickerson, 508 U.S. 366 (1993), did not apply to this case and personal safety, rather than non-threatening contraband, was the reason behind the officer's entering the suspect's pocket.

DISCOVERY - BRADY

In *State v. Thorson*, 2003 ND 76, 660 N.W.2d 581, the Court held that failure of the state to provide the defendant with a copy of a form 960 Report of Suspected Child Abuse that was filed with the Department of Human Services was not reversible obvious error.

The defendant was charged with two counts of committing gross sexual imposition involving sexual contact with his girlfriend's nine-year old daughter. During pre-trial discovery, the defendant requested that the state, under North Dakota Rule of Criminal Procedure 16(f), disclose the names and statements of all prosecution witnesses and the relevant statements within its possession or control by other persons. The prosecution responded by sending the defendant a copy of the criminal complaint, an 11-page police report, and a criminal history. During trial, an investigating officer testified that his investigation began after he received a form 960 report from the Department of Human Services of suspected child abuse by the defendant. Although the 960 report was referred to in the police report disclosed to the defendant, the prosecution did not provide the defendant a copy of the 960 report and it was not introduced as evidence in the case.

During deliberations, the jury inquired as to whether it could see the 960 report. The Court responded that the 960 report was not introduced as an exhibit and therefore the jury could not see it.

The defendant claimed he was denied his discovery rights under Rule 16(f) and his rights to disclosure of exculpatory information under Brady v. Maryland, 373 U.S. 83 (1963). The defendant conceded that he did not raise the discovery issued before the trial court but claims that the prosecution's failure to provide him a copy of the 960 report constituted obvious error entitling him to reversal of his conviction and a new trial.

Rejecting the defendant's claims, the court noted that under North Dakota Rule of Criminal Procedure 16, the prosecution must disclose, upon the defendant's request, names and statements of witnesses the prosecution intends to call and also the relevant statements within the prosecution's possession or control of other persons. Rule 16 is a discovery rule designed to further the interests of fairness. If the defendant fails to show prejudice from a violation of Rule 16, it is not a abuse of discretion for the trial court to refuse to admit evidence as a sanction for a violation of that rule.

The record did not establish who filed the report of suspected abuse nor did it include the 960 report. If the report contained statements of the victim, who testified at trial, the disclosure of those statements was

required under Rule 16. If the report contained statements of the victim's mother who did not testify at trial, or a counselor, teacher, or other person with knowledge of the situation, the prosecution may have been required to provide the report to the defendant under Rule 16(f)(3). For purposes of the appeal, the Court assumed that the prosecution was required to provide the 960 report to the defendant.

To be entitled to relief for a Rule 16 violation, the defendant must show prejudice. The defendant made no showing the information contained in the 960 report would have been exculpatory or would have supported his theory of the case. He made no showing that the failure to disclose to him the contents of the report prejudiced his defense. The state's failure to provide the report to the defendant did not constitute reversible obvious error.

The defendant also claimed his discovery rights under Brady were violated. To establish a Brady discovery violation, the defendant must show the government possessed evidence favorable to the defendant, the defendant did not possess the evidence and could not have obtained it with reasonable diligence, the prosecution suppressed the evidence, and a reasonable probability existed that the outcome of the proceedings would have been different if the evidence had been disclosed. The Brady rule does not apply to evidence the defendant could have obtained with reasonable diligence and the defendant's failure to discover evidence from a lack of diligence defeats a Brady claim the prosecution withheld that evidence.

The defendant could not demonstrate for purposes of establishing a Brady violation that the outcome of the proceedings would have been different had the contents of the 960 report been disclosed. The defendant also failed to establish a Brady violation because he did not act with reasonable diligence to obtain the 960 report. The defendant, with reasonable diligence, could have obtained and reviewed the 960 report after its existence had been disclosed by the police report.

INVESTIGATORY STOP - TEMPORARY DETENTION

In *State v. Fields*, 2003 ND 81, 662 N.W.2d 242, the Court affirmed the granting of the defendant's motion to suppress evidence found after a motor vehicle stop.

An officer noticed the defendant driving his vehicle. Earlier that morning, the officer had been informed that the license tags on the defendant's vehicle were expired, that the drug task force had information that the defendant had received a shipment of drugs a few days earlier, the defendant had a previous arrest on drug charges, and, according to another officer and a confidential informant, the defendant was continuing to deal drugs. The officer initiated a traffic stop. During the stop, the defendant was asked for his driver's license, registration, and proof of insurance. Although he had a driver's license, he did not have registration or proof of insurance and the officer testified at the suppression hearing that the defendant was acting nervous during the stop. When asked why he was driving so late at night, at 3:24 a.m., the defendant told the officer that he was on his way to a convenience store to buy milk and cereal.

After the officer issued the defendant a citation for the expired tags, he said good-bye, turned, and began to walk away. The officer then reapproached the vehicle and asked the defendant if he had any drug or weapons in the vehicle, which the defendant denied. The officer then asked for the defendant's consent to search the vehicle, which was refused.

The officer then informed the defendant that he was calling for a drug detection dog to do a K-9 search of the outside of the vehicle and asked the defendant to leave his vehicle and

stand next to him. It took approximately 30 minutes for the drug detection dog to arrive at the scene and, when it arrived, it gave a positive indication on the vehicle. The vehicle was then searched revealing a loaded gun and illegal drugs. The trial court granted the defendant's motion to suppress, concluding that the officer lacked a reasonable and articulable suspicion to continue the detention after the original purpose of the traffic stop had been completed and because the officer did not have probable cause to search the vehicle.

The Court affirmed the granting of the motion to suppress, concluding that the continued detention of the defendant past the point necessary to complete the initial traffic stop violated his 4th amendment right to be free from unreasonable seizure.

Neither party disputed the fact that the initial stop of the defendant's vehicle was proper. Traffic violations, even if considered common or minor, constitute prohibited conduct and provide officers with the required suspicion for conducting investigatory stops. The officer had been told earlier that the defendant's vehicle had expired tabs, which provided a proper basis to initiate the traffic stop.

When conducting a traffic stop, an officer can temporarily detain the traffic violator at the scene of the violation. The constitutionality of an investigative detention is judged under the framework established by Terry v. Ohio, 392 U.S. 1 (1968) requiring that an investigative detention be reasonably related in scope to the circumstances which justify the interference in the first place. For traffic stops, a reasonable period of detention includes the amount of time necessary for the officer to complete his duties resulting from the traffic stop.

The investigative detention may continue as long as reasonably necessary to conduct those activities and to issue a warning or citation. A traffic violator is subject to the arresting officer's authority and restraint until the officer completes issuance of the traffic citation and expressly releases the violator.

In this case, the officer issued the defendant a citation for the expired tabs and expressly released the defendant by saying good-bye, turning around, and starting to walk back to his vehicle. After the officer issued the traffic citation, the legitimate investigative purposes of the traffic stop were completed.

Once the purposes of the initial traffic stop are completed, a continued seizure of a traffic violator violates the 4th amendment unless the officer has a reasonable suspicion for believing that criminal activity is afoot. The constitutional inquiry in this case is reduced to two determinations: whether the defendant was seized within the meaning of the 4th amendment when he was held awaiting arrival of the drug detection dogs and, if so, whether there was a reasonable suspicion to support the seizure.

A person has been seized within the meaning of the 4th amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. In this case, after the defendant refused to consent to a search of his vehicle, he was told that the drug detection dog would be called and that a drug sniff of the vehicle would be conducted. The officer asked the defendant to get out of his car and to stand by him. It was reasonable to believe that a person in the defendant's position would not have felt free to leave the scene. The defendant was seized within the meaning of the 4th amendment when he was held awaiting the arrival of the drug detection dog and, unless the officer had a reasonable and articulable suspicion to believe that criminal activity was afoot, the continued detention of the defendant after completion of the traffic stop would amount to a 4th amendment violation.

A Court will consider the totality of the circumstances when deciding whether reasonable suspicion exists. An objective standard is applied taking into account the inferences and deductions that an

investigating officer would make that may elude a lay person. The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. Although knowledge of the defendant's prior criminal history may be a legitimate factor to be taken into account, knowledge of a person's criminal history by itself is not enough to support a finding of reasonable suspicion. Information possessed by the officer, from other officers and a confidential informant, that the defendant was participating in drug activities and had recently received a shipment of drugs, was conclusory in content. There were no specific facts that connected the defendant's alleged drug activities to his vehicle or to his travels on the night that he was stopped. It was only conclusory information that the defendant continued to deal drugs and had received a shipment a couple of days prior. It was unclear whether information provided by the other officers or the informant was reliable.

Other factors considered by this officer, the defendant's nervousness and his explanation of why he was out late at night, although factors which can be considered in the reasonable suspicion determination, were insufficient to provide a basis for the further detention of the vehicle. The combination of the factors presented in this case were not sufficient to provide the officer with a reasonable and articulable suspicion that criminal activity was afoot. Before the initial traffic stop occurred, the officer had knowledge of the defendant's past criminal history and the nonspecific information received from fellow officers and a confidential informant regarding the defendant's drug activities. This information did not amount to a reasonable and articulable suspicion needed to initiate a traffic stop since it was the officer's knowledge of the expired licensed tabs that made the initial traffic stop valid. The only additional observations made by the officer during the initial stop were the defendant's nervous behavior and his suspicious story about going to the convenience store at 3:24 a.m. Nervousness during a traffic stop and traveling during the late night hours are acts that could describe a very large category of presumably innocent travelers. Considering the totality-of-the-circumstances in this case, the Court concluded that the officer was acting on a mere hunch when he seized the defendant to wait for the drug detection dog. Reasonable suspicion requires more than a mere hunch.

APPEAL

In *State v. Moore*, 2003 ND 83, 662 N.W.2d 263, the Court dismissed the defendant's appeal upon his conviction of gross sexual imposition for lack of appeal ability.

After the defendant's conviction of gross sexual imposition, he raised numerous post-trial motions which were all denied. Eight months later he filed 11 additional motions including motions for pre-trial discovery materials, a transcript of the entire court proceeding, a prospective juror list used at his trial, and objections to the dismissal of a second gross sexual imposition count at the state's request without prejudice. These motions were denied as well and the defendant appealed.

The right to appeal in North Dakota is governed purely statute and an order is appealable only if it comes within the provisions of specific statute. The defendant's appeal did not fall within the statutory authority for appeals by a defendant in a criminal case in N.D.C.C. § 29-28-06.

In addition, dismissal of the second gross sexual imposition count in the information without prejudice, upon the state's motion, is not appealable.

SEARCH WARRANT - OMISSION OF RELEVANT INFORMATION - INVESTIGATIVE STOP

In *State v. Corum*, 2003 ND 89, _____ N.W.2d ____, the Court affirmed the denial of the defendant's motion to suppress evidence and a criminal judgment finding him guilty of possession of drug paraphernalia.

The defendant was a passenger in a vehicle parked with its lights off on the side of the road. The vehicle was near an anhydrous ammonia storage yard which had been the subject of several prior thefts. No other businesses or homes were in the area. A deputy noticed a flash of light which he believed to be from a flashlight in the ditch by the passenger's side of the vehicle. The flashlight appeared to be outside the vehicle. The officer then noticed a yellow flash of light from the vehicle's right front turn signal as if someone had bumped the turn signal lever while climbing into the vehicle. The headlights of the vehicle came on and it pulled on to the roadway. As the deputy passed the vehicle, he saw two males in the front seat, one of which was the defendant.

The deputy then turned around and stopped the vehicle by activating overhead lights. Upon approaching the vehicle, the deputy observed two tanks in the back of the vehicle which were frosted over and the valves were bluish in color indicating they had been filled with anhydrous ammonia. The deputy obtained consent to search the vehicle and confirmed that the tanks contained anhydrous ammonia. Both the defendant and the driver of the vehicle were placed under arrest for theft of anhydrous ammonia and, while the defendant was being booked into jail, an inventory search of his wallet produced receipts showing recent multiple purchases of pseudoephedrine and batteries used, with anhydrous ammonia, to manufacture methamphetamine.

Later that day, another officer testified about the defendant's participation in the anhydrous ammonia theft and the receipts found in his wallet when the officer was applying for a search warrant to search the defendant's home. The officer also testified he had previously received information from an informant, who was named, that the defendant was manufacturing methamphetamine and that the defendant kept ingredients and finished product at his home. The magistrate found probable cause, issued the search warrant, and the resulting search produced drug paraphernalia and other contraband.

The defendant first challenged the validity of the traffic stop that produced evidence of his involvement in the theft of the anhydrous ammonia and the purchases of pseudoephedrine and batteries.

Illegally obtained evidence cannot be a basis for a magistrate's finding of probable cause to support a search warrant. Because the evidence obtained from the vehicle stop is crucial to the validity of the warrant, the warrant would not be supported by probable cause if the vehicle stop was unlawful.

To stop a moving vehicle for investigative purposes, an officer must have a reasonable and articulable suspicion that the law has been or is being violated. The reasonable suspicion standard is less stringent than probable cause but it does require more than a mere hunch. The Court employs an objective standard and looks at the totality-of-the-circumstances in determining whether an investigative stop is valid. Reasonable suspicion for a stop exists when a reasonable person in the officer's position would be justified by some objective manifestation to believe the defendant was, or was about to be, engaged in unlawful activity.

An officer is not required to isolate a single factor which, standing alone, signals a potential violation of the law. Rather, officers are to assess the situation as it unfolds and, based upon inferences and deductions drawn from their experience and training, make the determination whether all of the

circumstances viewed together create a reasonable suspicion of potential criminal activity. The Court will examine all of the information known to the officer at the time of the stop and consider inferences and deductions an investigating officer would make which may elude a lay person.

The Court distinguished a motor vehicle stop that was disapproved in State v. Johnson, 1999 ND 241, 603 N.W.2d 485. In that case, a vehicle was stopped solely for the reason that it was seen passing through a sparsely lit area in a parking lot near where a bar had been burglarized several months earlier.

In Johnson, the prior burglaries in the area where the officer observed the vehicle were the only facts giving rise to a suspicion of unlawful activity. If the stop in Johnson were upheld, an officer could essentially stop any vehicle traveling at a suspicious hour in the vicinity of prior criminal activities. In this case, however, there are additional crucial factors which, when viewed in the totality through the eyes of a trained law enforcement officer, are sufficient to give rise to a reasonable suspicion of unlawful activity. The vehicle was not merely passing through an area where there had been prior crimes but was stopped on a rural highway next to an anhydrous ammonia storage yard where there had been several earlier thefts. Deputies had been specifically instructed to check the tanks because of the prior thefts and, unlike the bar involved in Johnson, the anhydrous ammonia storage yard was located in a rural area with no other businesses or residences nearby.

In addition, the deputy observed a flashlight shining outside the vehicle. It is one thing for a vehicle to drive through a bar's parking lot at 4 a.m. and quite another for a vehicle to be stopped on a highway at 4 a.m. with the occupants outside the vehicle and in a rural area where previously burglarized anhydrous ammonia storage yard is the only nearby facility of any kind. Under these circumstances, the Court concluded there was a reasonable and articulable suspicion of unlawful activity justifying an investigative stop of the vehicle.

The defendant also claimed that there was insufficient evidence in support of the warrant to establish probable cause. The officer applying for the warrant informed the Court of the facts and circumstances concerning the arrest of the defendant and the items found in his wallet. The officer also provided information given by the named informant regarding the defendant's drug activities and a basis for a determination that such information from the informant was reliable. The officer testified that the defendant had a criminal record with prior drug related charges which may be used to support a determination of probable cause when used in connection with other evidence. Viewed in the light of the totality-of-the-circumstances, the evidence presented to the magistrate would warrant a person of reasonable caution to believe there was a fair probability contraband or evidence of the crime would be found in this home.

The defendant also claimed that the officer failed to tell the magistrate that the named informant had prior drug convictions and had pending criminal charges against her when she provided the information about the defendant to the officer. The defendant claims that if this information had been provided to the magistrate there would not have been probable cause to issue the warrant. Applying the standards set forth in Franks v. Delaware, 438 U.S. 154 (1978), the Court concluded that failure inform the magistrate about an informant's criminal history, that there were pending criminal charges against the informant, or that the informant had been promised leniency for the information would not be fatal to the validity of the warrant. In denying the motion to suppress, the trial Court concluded that probable cause existed for the search warrant even if the information about the named informant's criminal history and pending charges had been provided to the magistrate. The Court did note, in a footnote, however, a caution to prosecutors and law enforcement officers that the better practice

when applying for a search warrant is to supply all obviously relevant information, particularly the criminal history and pending charges of an informant, to the magistrate in the application. Such a practice may often obviate the necessity of appellate judicial review of search warrants.

DRIVING WHILE UNDER THE INFLUENCE OF DRUGS - PROBABLE CAUSE

In *Sonstahagen v. Sprynczynatyk*, 2003 ND 90, ____ N.W.2d ____, the Court affirmed the Department of Transportation's decision to revoke Sonstahagen's driving privileges for two years.

An officer observed Sonstahagen's vehicle approaching the Interstate from an on-ramp traveling at what the officer believed was a speed in excess of the posted speed limit. The vehicle failed to yield as it entered the Interstate. The officer stopped the vehicle and, when approaching the vehicle, the officer detected a strong odor of marijuana coming from inside. The officer observed Sonstahagen's eyes were red and squinty. After Sonstahagen was asked to step out of the vehicle, he performed several field sobriety tests and was subsequently placed under arrest for driving while under the influence of drugs. At the correctional center, Sonstahagen was read the implied consent advisory and asked to submit to a urine test. The defendant did not provide that test after his unsuccessful attempt to contact a lawyer.

The defendant first claimed that the officer was not a trained drug recognition expert and could not testify at the administrative hearing about the field sobriety tests that were conducted. The only foundation required to permit a law enforcement officer to testify about the results of field sobriety tests is a showing of the officer's training and experience in administering the test and a showing that the test was in fact properly administered. Because the officer in this case had the necessary training and experience to administer the tests and because there was no dispute as to the proper administration of the tests, the required foundation for the testimony was established.

The Court also rejected Sonsthagen's claims that the officer did not have reasonable grounds to believe that Sonsthagen was driving under the influence of drugs. In determining what is necessary to establish reasonable grounds or probable cause to arrest a driver for driving while under the influence of drugs, the Court is guided by what it had stated is necessary to arrest a driver while driving under the influence of alcohol. These two grounds are that the law enforcement officer first must observe some signs of impairment, physical or mental, and, second, that the officer must have reason to believe the driver's impairment is cause by alcohol. This two-part test will be applied to an arrest for driving while under the influence of drugs. For the officer in this case to have probable cause to arrest Sonsthagen for driving under the influence of drugs, the officer must observe some signs of physical or mental impairment and have reason to believe Sonsthagen's impairment is caused by drugs.

In this case, the officer observed traffic violations indicating impairment when considered in context of driving while under the influence of drugs. The officer was trained in administering sobriety tests which would reflect impairment regarding drugs. Also, it was notable that the officer smelled a strong odor of marijuana coming from inside Sonsthagen's vehicle. This smell of marijuana can be an important factor in establishing probable cause. The totality-of-the-circumstances and evidence observed by the officer supported the conclusion that the officer had reasonable grounds to believe Sonsthagen was driving under the influence of drugs.

CREDIT FOR TIME SERVED

In *Cue v. State*, 2003 ND 97, ____ N.W.2d ____, the Court affirmed the district court's order denying Cue's motion for post-conviction relief seeking additional credit to his sentence for time served in custody.

In June of 2001, Cue received a sentence of two years imprisonment after a second probation revocation order. He was given 103 days of credit for time served in custody which was later amended to give Cue credit for 108 days served prior to sentencing. In September of 2002, Cue filed a post-conviction relief petition claiming that he was entitled to 161 days of credit. The petition was denied.

Cue has the burden of showing that he was entitled to additional sentence credit for time served in custody. The evidence in the record was conflicting and confusing. Cue had previously moved the district court for credit of 127 days for time served and 10 days later filed a supplement to his motion seeking 184 days of credit. The state argued that it was possible that Cue should be credited for 108 days for time spent in custody and those days were included within the district court's amended order. In the post-conviction relief proceedings, Cue claimed that he was entitled to 161 days of credit for time served but the state asserted in its calculations that he was overcredited 38 days for time spent in custody for cases occurring during the time period at issue.

The Court noted that Cue's arguments during the proceedings related to the case were inconsistent. His testimony and claims conflicted with the records from the correctional centers that he presented to the district court. He had not established with evidence in the record that he was not properly credited for the time spent in custody. He failed to affirmatively establish by the record that he was entitled to additional credit for time served in connection with the case and the record did not demonstrate that the district court's findings were clearly erroneous.

SEARCH INCIDENT TO ARREST - PURSE LEFT IN MOTOR VEHICLE

In *State v. Tognotti*, 2003 ND 99, ____ N.W.2d ____, the Court reversed the district court's order suppressing evidence and overruled State v. Gilberts, 497 N.W.2d 93 (N.D. 1993), to the extent that its rationale is contrary to the holding in this case.

An officer observed a vehicle being driven with its headlights off. The defendant was driving the vehicle with her infant daughter, her husband, and a friend. After the officer stopped the vehicle, he checked the occupant's identifications and returned to his police car to check for outstanding arrest warrants. An outstanding arrest warrant existed for a passenger in the vehicle. The officer arrested the passenger and placed him in the police car. After requesting that the defendant and her husband leave the vehicle, the officer conducted a search of the vehicle's interior.

The officer searched the defendant's purse which was lying on the driver's side of the front seat and discovered drug paraphernalia inside and what appeared to be methamphetamine residue.

The district court concluded that the search fell within the State v. Gilberts and granted the defendant's motion to suppress, concluding that the search of the purse following the passenger's arrest was an improper search incident to the arrest.

The Court agreed with the district court that the circumstances in this case were not legally distinguishable from the facts in Gilberts. However, in view of the United

States Supreme Court decision in Wyoming v. Houghton, 526 U.S. 295 (1999), and subsequent cases applying the rationale of that decision to a search incident to an arrest, the court believed it appropriate to reexamine Gilberts and to adopt a bright-line rule for searching containers found in a vehicle that was searched incident to an arrest.

In New York v. Belton, 453 U.S. 454 (1981), the Court established a bright-line rule for police searches of an interior of a vehicle when the occupants of the vehicle have been arrested. In Belton, all of the occupants of the vehicle had been arrested prior to the officer's search of the vehicle's interior. A slightly different factual situation was presented in Gilberts when the officer arrested the driver of the vehicle and then proceeded to search the interior of the vehicle including a jacket of a nonarrested occupant. The Court in Gilberts concluded that, standing alone, the driver's arrest was an inadequate ground for the intrusion upon the passenger's constitutional rights.

Since Gilberts, the Supreme Court has continued to recognize the Belton rule that once a person has been lawfully arrested an officer may search the passenger compartment of the arrestee's vehicle without a warrant. The Belton rationale authorizes an officer to search a vehicle incident to arrest, irrespective of whether the arrest occurs inside or nearby the stopped vehicle.

Upon reexamining the rationale in Gilberts, the Court concluded that imposing a restriction on searches of a vehicle incident to arrest based upon ownership of containers or other articles inside the vehicle unnecessarily dims the bright-line rule announced by Belton. The need to maintain a clear and workable rule for police searches is evident from the reasoning of Wyoming v. Houghton. In that case, it was concluded that a police office can, consistent with the 4th amendment, search a passenger's personal belongings inside a vehicle when the officer has probable cause to believe the vehicle contains contraband. Later decisions in other jurisdictions have applied the rationale of Houghton to searches incident to arrest. Courts in other jurisdictions, although not relying upon the Houghton decision, have concluded that the Belton bright-line rule should be applied to allow an officer to search containers belonging to nonarrested passengers when the officer is conducting a vehicle search incident to the arrest of another occupant.

The Court held that an arresting officer's search of a purse belonging to a nonarrested occupant which was voluntarily left in the vehicle is a valid search incident to the arrest of a passenger in the vehicle. To the extent that Gilberts is contrary to its holding in this case, Gilberts is overruled.

The Court did find it significant that no testimony was taken regarding whether the defendant voluntarily left her purse in the vehicle when she exited or whether the officer instructed her to leave the purse in the vehicle. This is a relevant fact which could affect the outcome of the motion to suppress and should be explored upon remand.

There is no automatic search rule for companions of an arrestee. A law enforcement officer may conduct a frisk or a pat-down search of a person only when the officer possesses an articulable suspicion that the individual is armed and dangerous. Although the bright-line rule in Belton allows an officer to search the interior of a vehicle upon arresting an occupant of the vehicle, Belton does not authorize the search of another occupant of the vehicle merely because the occupant was there when the arrest occurred, or the search of a nonarrested passenger based solely on the arrest of the driver or another occupant of the vehicle.

Therefore, if the defendant was standing outside of the vehicle with her purse when her passenger was arrested, the officer could not conduct a pat-down of the defendant or search her person or purse without probable cause that she was involved in criminal activity or an articulable suspicion that she was armed and presently dangerous.

Other courts have held that an officer cannot order a nonarrested occupant of a vehicle to leave a purse inside of the vehicle and then search it incident to the arrest of another occupant of the vehicle. A purse, like a billfold, is such a personal item that it logically carries for its owner a heightened expectation of privacy, much like the clothing the person is wearing. The 4th amendment will be violated when an officer directs that a purse be left in the vehicle and then searches the purse incident to the arrest of another passenger.

The factual issue whether the officer instructed the defendant to leave her purse in the vehicle or whether she voluntarily left it there when the officer asked her to exit the vehicle is both relevant and dispositive of the motion to suppress evidence in this case. If the officer did not instruct the defendant to leave the purse in the vehicle, he was entitled to search it incident to the arrest of the passenger. However, if the officer instructed the defendant to leave the purse in the vehicle, her 4th amendment rights against unreasonable search and seizure would preclude the officer from searching the purse incident to the passenger's arrest. Under that circumstance, the motion to suppress should be granted. The case was remanded with instruction that the district court hold a limited evidentiary hearing on this relevant fact issue and make a redetermination on the motion.

INEFFECTIVE ASSISTANCE OF COUNSEL

In *Damron v State*, 2003 ND 102, ____ N.W.2d ____, the Court affirmed the district court's dismissal of Damron's post-conviction claim of ineffective assistance of counsel when he failed to provide evidentiary support for his allegations.

While represented by counsel, the defendant entered into a conditional plea agreement pleading guilty to theft of property and to five counts of tampering or damaging a public service. Under the agreement, a burglary charge was dismissed and the defendant preserved the right to appeal matters regarding a search warrant and the trial court's denial of his motion to suppress evidence. The search warrant and subsequent search was upheld in a later appeal.

Damron claimed that he was not afforded effective assistance of counsel because his attorney failed to adequately advise him on the plea agreement, failed to interview alibi witnesses, and failed to investigate facts surrounding the incident in question.

To be entitled to relief, Damron must meet the requirements of the test established in Strickland v. Washington, 466 U.S. 668 (1984). Not only must Damron show that his counsel's performance was deficient, but also that such errors were so serious as to deprive him of a fair trial. In other words, that he was prejudiced by the errors. The prejudice portion of the Strickland test requires the defendant to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different and the defendant must point out with specificity how and where trial counsel is incompetent and the probable different result. In providing that counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Damron argued that he repeatedly turned down any offers to plead guilty but his attorney went behind his back and negotiated a conditional plea agreement. He argued that he did not have an opportunity to read the agreement before being told by his attorney to sign it and, had his attorney provided him time to read the plea agreement, he would not have pled guilty.

A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea. The voluntariness of such a guilty plea turns on whether that advice was within a range of competence demanded of attorneys in criminal cases.

The record established the trial court followed the mandatory advice required by North Dakota Rule of Criminal Procedure 11(b) to insure that Damron's guilty plea was voluntary. Damron did not object that he lacked knowledge of the plea agreement terms at two court hearings when he entered voluntary conditional pleas of guilty. A defendant is bound by his guilty plea unless he proves serious derelictions on the part of his attorney that kept his plea from being knowingly and intelligently made.

In criminal cases, a defendant has the burden to present evidence to overcome the presumption that defense counsel is competent and adequate, and to do so the defendant must point to specific errors made by trial counsel. The record did not support Damron's claim of a serious dereliction on the part of his attorney that would have prevented his plea from being anything other than knowingly and intelligently made. He could not prove with sufficient evidence that having a trial would likely have produced a better result. Since the trial court denied Damron's motion to suppress evidence seized under the search warrant, the state's evidence, which would have given weight to a guilty verdict, would have been admitted at trial. In this situation, advising his client to plead guilty was not a serious dereliction on the part of Damron's attorney. But for the plea agreement, Damron could have received a substantially greater sentence.

Damron also failed to produce any specific evidence that the testimony of any of his additional alibi witnesses would have caused him to refrain from pleading guilty. Similarly, he also failed to establish in what manner he suffered actual prejudice from his trial counsel's alleged failure to investigate more thoroughly or to move to suppress specific evidence. Ineffective assistance of counsel claims for counsel's failure to move to suppress evidence at a suppression motion hearing must be premised on actual, and not possible, prejudice to the defendant. A defendant must establish in what manner he was prejudiced by his attorney not having moved to suppress specific evidence.

ATTORNEY GENERAL'S OPINION 2003-F-02

DATE ISSUED: May 9, 2003

REQUESTED BY: Robin Thompson-Gordon, Kidder County State's Attorney

It is my opinion that N.D.C.C. § 63-05-01 creates a duty on landowners or operators of land adjoining regularly traveled county or township highways to cut weeds and grasses in the public right of way without regard to whether the land underlying the highway is owned in fee by the adjoining landowner or by the county or township.